IN THE

Supreme Court of the United States

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October Term, 1973
No. 73-1182

In the Matter of

SYLVIN S. PERRY,

Bankrupt.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

CURTIS B. DANNING,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A of Petition)[1] is reported at 487 F.2d 84. The opinion of the Court of Appeals on denial of rehearing (Appendix B of Petition) is reported at 487 F.2d 89. No opinion was issued by the United States District Court, Central District of California, in affirming the unreported decision of the Referee in Bankruptcy (Appendix C of Petition).

[1]The reference to "Petition" in this brief refers to the Petition for Writ of Certiorari.

Objection to Jurisdiction.

Because the Petition was filed one day later than the ninety days allowed by 28 U.S.C. §2101(c),[2] this Court lacks jurisdiction in this case. *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942).

Rehearing was denied and judgment entered on November 2, 1973 by the Ninth Circuit Court of Appeals. The Petition was filed on February 1, 1974, the ninety-first day after the entry of judgment. The period of applying for a writ of certiorari has not been extended by a Justice of this Court.

Petitioner's application for a writ of certiorari, therefore, "must . . . be denied for want of jurisdiction." *Department of Banking v. Pink, supra.*

Questions Presented.

Whether this case, involving a minor state tax collection statute and presenting no issues of wide concern, is inappropriate for the issuance of a writ of certiorari.

Whether the Ninth Circuit Court of Appeals was correct in holding that Petitioner's lien was not perfected as against a *bona fide* purchaser under state law at the date of bankruptcy.

Whether the Ninth Circuit Court of Appeals was correct in holding that Petitioner's lien did not meet

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[2] 28 U.S.C. §2101(c) provides as follows:

> (c) Any . . . writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice to the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

the requisi[te tests to qualify for substituted perfection by the filin[g of notice.

Statutes Involved.

In addit[ion to the statutes quoted in full in the Petition at 5-[10, the provisions of Cal. Code Civ. Proc. §674 and [Bankruptcy Act §70c, 11 U.S.C. §110(c) are directl[y relevant to the issues herein. Each of those statutes is [expressly referred to in a clause in a statute of major in[portance in this case.

Cal. Re[v. & Tax. Code §18882, quoted in full in the Petitio[n at 5 and herein, *infra* at footnote 8, p. 13, gives Petit[ioner's tax lien "the force effect, and priority of a ju[dgment lien. . . ." The California judgment lien statut[e is Cal. Code Civ. Proc. §674 (West Supp. 1973):

> §674. *Abstract of judgment; recording; lien of judgment; scope, duration.*
>
> An abstract of the judgment or decree of any court of this State, including a judgment of any court sitting as a small claims court, or any court of record of the United States, the enforcement of which has not been stayed on appeal, certified by the clerk, judge or justice of the court where such judgment or decree was rendered, may be recorded with the recorder of any county and from such record upon being the judgment or decree becomes a lien not exempt from execution, in such county, owned by him at the time, or which he may afterward and before the lien expires, acquire. Such lien continues for 10 years from the date of the entry of the judgment or decree unless the enforcement of the judgment or decree is stayed on appeal by

the execution of a sufficient undertaking or the deposit in court of the requisite amount of money as provided in this code, or by the statutes of the United States, in which case the lien of the judgment or decree, and any lien or liability now existing or hereafter created by virtue of an attachment that has been issued and levied in the action, unless otherwise by statutes of the United States provided, ceases, or upon an undertaking on release of attachment, or unless the judgment or decree is previously satisfied, or the lien otherwise discharged. The abstract above mentioned shall contain the following: title of the court and cause and number of the action; date of entry of the judgment or decree; names of the judgment debtor and of the judgment creditor; amount of the judgment or decree, and where entered in judgment book, minutes or docket in the justice court. (As amended Stats. 1955, c. 781, p. 1380, § 1; Stats. 1957, c. 43, p. 603, § 6.)

Similarly, the second proviso of Bankruptcy Act §67 (c)(1)(B), 11 U.S.C. §107(c)(1)(B), quoted in full in the Petition at 10 and herein *infra* at footnote 9, p. 13, refers to liens "valid against the trustee under section 70, subdivision c." Bankruptcy Act §70(c), 11 U.S.C. §110 (c), provides in full:

(c) The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee shall have as of the date of bankruptcy

the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists. If a transfer is valid in part against creditors whose rights and powers are conferred upon the trustee under this subdivision, it shall be valid to a like extent against the trustee. In cases where repugnancy or inconsistency exists with reference to the rights and powers in this subdivision conferred, the trustee may elect which rights and powers to exercise with reference to a particular party, a particular remedy, or a particular transaction, without prejudice to his right to maintain a different position with reference to a different party, a different remedy, or a different transaction.

Statement of the Case.

Respondent objected to Petitioner's priority lien claim on the basis that it was not perfected against the trustee under Bankruptcy Act §67 (c)(1)(B), 11 U.S.C. §107(c)(1)(B), because California law gives Petitioner's lien the "force, effect, and priority of a judgment lien," and judgment liens in California attach only to real property. The Honorable Ray H.

Kinnison, Referee in Bankruptcy, agreed with Respondent's construction of California law and placed Petitioner in the general creditor category.

After the District Court refused to review the case, the Ninth Circuit Court of Appeals affirmed the Referee's decision, although on different grounds. It held that Petitioner had to execute upon its personal property lien under California law in order to perfect the lien against the trustee in his status of a *bona fide* purchaser. In its opinion denying rehearing, the Ninth Circuit rejected Petitioner's argument, raised for the first time in its petition for rehearing, that its lien had been perfected by the filing of notice. The Ninth Circuit held that Petitioner had not met any of the three required tests for this substituted method of perfection.

On the ninety-first day after rehearing was denied, Petitioner filed its Petition for Writ of Certiorari with this court.

ARGUMENT.

I.

Because It Involves the Construction of a Minor State Tax Collection Statute and Presents No Federal Issues nor Issues of National Concern, This Case Is Not Appropriate for the Issuance of a Writ of Certiorari.

A. Introduction.

In 1923, Chief Justice Taft wrote:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given . . . to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing." *Magnum Import Co. v. De Spoturno Coty*, 262 U.S. 159, 163 (1923).

The instant case presents no issues of general public interest or importance. The principal question concerns construction of a California tax collection statute in conjunction with the California judgment lien statute. On this issue of first impression, the decision by the Ninth Circuit Court of Appeals, by a panel all of whom are members of the California bar, painstakingly and correctly construed the statutes.

That decision has very little significance beyond the instant case in California. Petitioner can continue to secure its claims by execution and related methods, or it can seek a relatively simple legislative amendment to the tax collection statute at issue here. Even Petitioner does not argue that this case has any signifi-

cance outside of California, since an asserted misapplication of state law is Petitioner's sole ground for requesting certiorari. Petition at 2.

B. The Decision of the Ninth Circuit Court of Appeals Is of No Importance Outside of California and Will Have Only a Minimal Impact Inside the State.

In an address before the American Bar Association in 1949, Chief Justice Vinson said: "To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." 69 S.Ct. V, VI (1949). At another point he suggested that one criterion for granting certiorari should be whether the case involves "widespread uncertainty regarding problems of national importance." *Id.* at X.

Although the instant case is one in bankruptcy, there are no significant bankruptcy issues raised.[3] Rather, the issues are ones of state law in the technical field of tax liens, a field in which statutes may vary widely from state to state. Moreover, it is the relationship between a particular tax lien statute, Cal. Rev. & Tax. Code §18882, and the judgment lien statute, Cal. Code Civ. Proc. §674, which is at issue here, and it seems most unlikely that such a narrow issue would

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[3]There is one very peripheral bankruptcy issue with regard to the construction of the "notice thereof" language in the second provision of Bankruptcy Act §67(c)(1)(B), 11 U.S.C. §107 (c)(1)(B), but Petitioner had to, and did not, demonstrate that its lien met two other tests concerning state law before this issue could be reached. See discussion of the §67(c)(1)(B) proviso, *infra*, at pp. 18-19.

have any close analogies elsewhere. Indeed, one indication of the nonimportance of this issue is the fact that no similar cases could be found on the subject, in California or any other state.

Even in California, the Ninth Circuit's resolution of this issue will have little impact beyond the present case. The other four California tax lien statutes,[4] which are somewhat analogous to Rev. & Tax. Code §18882, all implicitly require seizure of personal property to perfect the lien as against a bona fide purchaser of personal property subject to the lien. Thus the Ninth Circuit's holding will not in any way affect these other statutes and has the additional, beneficial effect of harmonizing Cal. Rev. & Tax. Code §18882 with them. That result is in compliance with the California rule of statutory construction that inconsistent provisions on the same subject will not be presumed. See *In re Haines,* 195 Cal. 605, 613, 234 Pac. 883, 886 (1925); *Proctor v. San Francisco Port Authority,* 266 Cal.App.2d 675, 682, 72 Cal.Rptr. 248, 253 (1968).

In the limited area of tax collections with which Cal. Rev. & Tax. Code §18882 is concerned, Petitioner retains many options after the Ninth Circuit's decision for enforcing its current and future liens. There is no substance to Petitioner's attempt to make this case seem important by implying that Petitioner will lose most of its $100,000,000 in outstanding liens against

[4]Rev. & Tax. Code §§6757, 6757.5, Unemp. Ins. Code §§1703, 1703.5 quoted in full in Petition at 6-9.

personal property. See Petition at 4, 14, 31. As the Ninth Circuit pointed out, *In re Perry, supra,* 487 F.2d at 84, Petitioner can perfect any lien by merely "issuing and levying a warrant for the collection of the tax. . . ."[5]

Even if one assumes *arguendo* that the Ninth Circuit's holding was an incorrect construction of California law, Petitioner retains the option of relitigating this issue in another case in the California courts and obtaining a different result. The California courts are not bound by decisions of the lower federal courts, *Western Oil & Refining Co. v. Venago Oil Corp.,* 218 Cal. 733, 741, 24 P.2d 971, 974 (1933), nor of the United States Supreme Court, *Elliott v. Superior Court,* 168 Cal. 727, 733, 145 Pac. 101, 104, with regard to questions of state law. Finally, of course, Petitioner can urge the California legislature to amend Cal. Rev. & Tax. Code §18882 to explicitly comply with Petitioner's twisted construction of the present statute.

C. On the Questions of State Law at Issue Here, Which Have Not Been Addressed by the Highest State Court nor Any Intermediate State Court, the United States Supreme Court Should Defer to the Considered Judgment of the More Locally-Oriented Ninth Circuit Court of Appeals.

The Supreme Court's policy with regard to state law issues decided by the courts of appeals was clearly articulated in *Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944): "[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered de-

[5]Contrary to Petitioner's unsupported assertion, Petition at 17, we believe that execution upon personal property is no more likely than the recordation of a tax lien to drive a debtor into bankruptcy.

termination of questions of state law by the intermediate federal appellate courts. . . ." This policy was more recently affirmed in *Pierson v. Ray*, 386 U.S. 547, 558 n. 12 (1967). See also *Magenan v. Aetna Freight Lines*, 360 U.S. 273, 281 (1959) (Frankfurter, J., dissenting). It is a policy based upon the sound premise that circuit judges are likely to be more knowledgeable concerning the laws of the states in their respective circuits than justices of the Supreme Court can be with regard to any state's laws. See *Propper v. Clark*, 337 U.S. 472, 486 (1949).

In this context it becomes particularly relevant that the three federal judges who decided this case[6] are all members of the California bar. The significance of this fact was recognized by this Court in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204 (1956):

> "Since the federal judge making these findings is from the [state] bar, we give special weight to his statement of what the [state] law is." See also *Helvering v. Stuart*, 317 U.S. 154, 163 (1942) (circuit judge had "long experience in the jurisprudence of [the] state").

The decision of this qualified panel is particularly entitled to deference because the complex and narrow state issue here is one of first impression. There have been no decisions of the California Supreme Court nor of any California court of appeals which consider the particular issue presented in this case,[7] nor have there

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[6]Duniway and Hufstedler, Circuit Judges, and Zirpoli, District Judge, sitting by designation.

[7]Petitioner agrees that "[t]he particular narrow issue before the Court had not been decided previously", Petition at 18, but

been any cases construing the statute at issue in any manner that would give guidance in the instant case. In this situation, the decision of this court in *MacGregor v. State Mut. Life Assur. Co.*, 315 U.S. 280, 281 (1942) seems pertinent:

> No decision of the Supreme Court of Michigan, or of any other court of that State, construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan.

It should be pointed out in conclusion that Respondent believes that the Ninth Circuit's decision was unquestionably the correct construction of California law, as discussed *infra* at p. 13. Even assuming *arguendo* that reasonable arguments could be made on both sides of the question, however, this Court has in such situations in the past deferred to the state law expertise of the Court of Appeals and left its holding undisturbed. See, *e.g.*, *Estate of Spiegel v. Comm'r*, 335 U.S. 701, 708 (1949).

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then suggests that the case of *Wright v. Standard Engineering Corp.*, 28 Cal.App.3d 244, 104 Cal.Rptr. 539 (1972), should have been "followed" by the Court of Appeals. Yet Petitioner recognizes that that case involved a different statute and was concerned with collection of a different tax. Petition at 19. Moreover, what Petitioner asserts to be a holding, Petition at 20, appears to be mere dictum on an unlitigated issue. See discussion of the *Wright* case, *infra*, at pp. 16-17.

II.

The Ninth Circuit Court of Appeals Was Clearly Correct in Its Construction of a Complex State Collection Statute.

A. The Ninth Circuit's Construction Is in Accord With the Plain Language of the Statute and With State Tax Lien Policy.

Cal. Rev. & Tax. Code §18882 allows the Franchise Tax Board to obtain a lien with "the force, effect, and priority of a judgment lien."[8] The statute says nothing, however, about when the lien is perfected against *bona fide* purchasers; the resolution of this issue was crucial to a determination of the validity of Petitioner's statutory lien against the bankruptcy trustee, Respondent herein, under §67(c)(1)(B) of the Bankruptcy Act, 11 U.S.C. §107(c)(1)(B).[9] Since there

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[8]Cal. Rev. & Tax. Code §18882 provides in full:

"*Tax certificate; lien; force, effect, and priority.* From the time of the filing for recording the amount of the tax, interest, and penalty set forth constitutes a lien upon all property of the taxpayer in the county, owned by him or afterward and before the lien expires acquired by him. The lien has the force, effect, and priority of a judgment lien and continues for 10 years from the date of the recording unless sooner released or otherwise discharged."

[9]Bankruptcy Act §67(c)(1)(B), 11 U.S.C. §107(c)(1)(B) provides in full:

"(c)(1) The following liens shall be invalid against the trustee:

"(B) every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists: *Provided*, That where a statutory lien is not invalid at the date of bankruptcy against the trustee under subdivision (c) of section 110 of this title and is required by applicable lien law to be perfected in order to be valid against a subsequent bona fide purchaser, such a lien may nevertheless be valid under this subdivision if perfected within the time permitted by and in accordance with the requirements of such law: *And*

were no reported cases on the subject, the Court of Appeals turned to the judgment lien statute, Cal. Code Civ. Proc. §674.[10]

The judgment lien statute only explicitly addresses liens upon real property, but the Ninth Circuit held that the term "all property" in Cal. Rev. & Tax. Code §18882 covered both real and personal property. *In re Perry*, 487 F.2d 84, 85 (9th Cir. 1973). It then examined the issue of perfection with regard to judgment liens and, based upon a careful consideration of relevant California law, held:

> In California, a recorded judgment creates a lien, good against *bona fide* purchasers, only upon the debtor's real property; the levy of a writ of execution is required to bind the debtor's personal property in a manner that is effective against *bona fide* purchases [*sic*]. Cal. Code Civ. Proc. §674 (West Supp. 1972); *Miller v. Bank of America*, 9 Cir., 1948, 166 F.2d 415, 417-419. Without such a levy, the lien of the judgment on personal property has no "force, effect [or] priority" against *bona fide* purchasers. Thus the California definition of the lien, and particularly of its "force, effect and priority," make it clear that, as far as personal property is concerned, the lien is not "perfected or enforceable" at the date of bankruptcy as required by 11 U.S.C. §107(c)(1)(B).

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provided further, That if applicable lien law requires a lien valid against the trustee under section 110(c) of this title to be perfected by the seizure of property, it shall instead be perfected as permitted by this subdivision by filing notice thereof with the court;"

[10]Cal. Code Civ. Proc. §674 is quoted in full at pp. 3-4, *supra*.

In addition to being the correct construction of California law, the Ninth Circuit's decision is in accord with state tax lien policy. The three principal state tax lien collection statutes are now harmonized, so that any tax lien on personal property will only be valid against a *bona fide* purchaser with actual knowledge of the lien. Moreover, this result complies with common sense. Petitioner has conceded that "filing of [a judgment] lien does not give any notice to third persons as to the encumbrancing of the debtor's personal property. Execution is necessary. . . ." Petition for Rehearing to the Ninth Circuit at 4.

B. The Ninth Circuit's Construction Is in Accord With All Applicable State Precedents and Rules of Construction.

As pointed out earlier, the Ninth Circuit was faced here with a question of first impression, upon which there were no reported state decisions. In this situation, the panel sought the best available expression of California law on the subject of judgment liens and their perfection:

> "The general rule is that goods and chattels of a judgment debtor are subject to liens predicated upon an execution but are not subject to liens predicated upon the rendition or entry of judgment.
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> . . .
>
> California follows the general rule that goods and chattels of a judgment debtor are subject to liens based upon an execution and not upon the rendition or entry of judgment." *Miller v. Bank of American N.T. & S.A.*, 166 F.2d 415, 418 (9th Cir. 1948).

Petitioner never suggests that *Miller* is in any way inaccurate in its statement of California law; indeed, Petitioner never even mentioned *Miller* in its Petition. Instead, Petitioner asserts that the case of *Wright v. Standard Engineering Corp.*, 28 Cal.App.3d 244, 104 Cal.Rptr. 539, should have been "followed" by the Ninth Circuit, despite the fact that *Wright* is concerned with a different statute and a different tax. Petition at 19-20. Petitioner never explains how its quotation from *Wright*, which tersely grants the State Board of Equalization priority for its statutory lien as against a judgment lien creditor, has any relevance to the issue of perfection as between a statutory lienholder and a *bona fide purchaser*.

Other aspects of the *Wright* case make Petitioner's reliance on it even more puzzling. At one point the *Wright* court states, in another context but in agreement with the Ninth Circuit's holding in the instant case, that an attachment lien on personal property is "not created merely by the issuance of a writ but rather by the levy by an officer on specific property." 28 Cal. App.3d at 249, 104 Cal.Rptr. at 542-543. Moreover, the State Board of Equalization in *Wright* did what the Ninth Circuit suggested Petitioner could have done in this case to perfect its lien: it levied a warrant for the collection of the tax. *Id.*, 28 Cal.App.3d at 246, 104 Cal.Rptr. at 540.

It is thus very unclear whether there was anything in *Wright* for the Ninth Circuit to "follow", at least in the direction that Petitioner suggests. There was absolutely no analysis or discussion in the *Wright* opinion of the central issue here: whether a tax lien on personal property is perfected by recordation or by execu-

tion. Even if *Wright* had said what Petitioner claims it said, then, under these circumstances, with a different statute, the Ninth Circuit would not have been bound by this California intermediate appellate court decision. *Cf. Comm'r v. Estate of Bosch,* 387 U.S. 456, 465 (1967).

In addition to fully following all relevant state precedent, the Ninth Circuit clearly complied with accepted state rules of statutory construction. The Ninth Circuit was faced with the choice of either giving effect to the "judgment lien" language of Cal. Rev. & Tax. Code §18882 or ignoring that express language in favor of a distorted construction based on the absence of a sentence in §18882 which is present in two other statutes, the course Petitioner urges. In accordance with the California rule of statutory construction requiring that meaning be given to every word of a statute, *Weber v. County of Santa Barbara,* 15 Cal.2d 82, 86, 98 P.2d 492, 494 (1940), the Ninth Circuit held that the "judgment lien" language of §18882 had to be given its full effect.[11]

Petitioner claims that the Franchise Tax Board "has treated section 18882 to be perfected against personal property. . . ." Petition at 27. But the issue of perfection of a lien is not one within the realm of administrative construction. The Board makes no judg-

[11]Petitioner is apparently confused when it asserts, Petition at 24-26, that the Ninth Circuit misconstrued Cal. Rev. & Tax. Code §6757 and Cal. Unemp. Ins. Code §1703. The Ninth Circuit was not construing, because this case does not involve, those two statutes; rather, it was construing Cal. Rev. & Tax. Code §18882 and only examined the other two statutes as part of its search for helpful analogies. The comments of the Ninth Circuit with regard to the two statutes do not purport to be authoritative and will not in any way affect tax collections or liens under those statutes.

ments, hands down no decision, as to when *its own* liens are perfected. Instead, Petitioner records and/or executes upon its lien, and then it is up to a court to determine whether that lien is valid as against *bona fide* purchasers.

The Ninth Circuit implicitly rejected Petitioner's argument, Petition at 29-30, that the effect of the federal income tax lien is governing in determining the effect of a Franchise Tax Board ("FTB") lien. Since the California Legislature explicitly gave the FTB lien the effect of a *judgment lien,* not the effect of a federal tax lien, this argument seems strained on its face. Moreover, as Petitioner admits, Petition at 29-30, the federal lien and the FTB lien differ significantly in how they are obtained, making Petitioner's alleged analogy between the two liens dubious as a matter of legislative policy.

III.

The Ninth Circuit Court of Appeals Was Clearly Correct in Its Rejection, for Three Independent Reasons, of Petitioner's Claim to Substitute Perfection of the Lien.

A. Introduction.

Since Petitioner did not execute upon its lien and therefore cannot enforce it against the trustee in bankruptcy within the trustee's rights as a *bona fide* purchaser, Petitioner seeks instead to save its lien through the operation of the second proviso of Bankruptcy Act §67(c)(1)(B), 11 U.S.C. §107(c)(1)(B).[12] Under

[12]Bankruptcy Act §67(c)(1)(B), 11 U.S.C. §107(c)(1)(B), is quoted in full at p. 13, *supra.*

this proviso, a lien must meet *each* of three distinct tests:

(1) The lien must have been valid against a judgment lien creditor under Bankruptcy Act §70(c), 11 U.S.C. §110(c), at the date of bankruptcy.[13]

(2) State law must specifically require seizure of property in order to perfect the lien as against a *bona fide* purchaser.

(3) Notice of intention to perfect the lien via the §67(c)(1)(B) procedure must be filed with the bankruptcy court.

Petitioner did not demonstrate to the Ninth Circuit and has not demonstrated here that its lien meets any of these three tests.

B. Petitioner's Unexecuted Lien Would Not Have Been Perfected Against a Judgment Creditor at the Date of Bankruptcy.

Before a lien can be perfected after bankruptcy, it must on the date of bankruptcy already be valid as against the trustee under §70(c) of the Bankruptcy Act, 11 U.S.C. §110(c), which gives the trustee the rights of a judgment lien or executing creditor. See *In re Century Vault Co.*, 416 F.2d 1035, 1038. n. 10 (3d Cir. 1969); 4 Collier on Bankruptcy ¶67.26 at 360, 366 (14th ed. 1971). In support of its contention, Petitioner merely cites again to the apparent dictum with regard to another statute in the California intermediate appellate case of *Wright v. Standard Engineering Corp., supra.* See analysis of the *Wright* case, *supra* at pp. 16-17. The Ninth Circuit correctly rejected this argu-

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[13]Bankruptcy Act §70(c), 11 U.S.C. §110(c), is quoted in full at pp. 4-5, *supra.*

ment of Petitioner's, holding that the lien "was not valid against judgment creditors at the date of bankruptcy." 487 F.2d at 89.

With regard to California law, the Ninth Circuit has held that "[t]he trustee unquestionably enjoys the rights [under Bankruptcy Act §70(c)] of a creditor who has levied attachment or execution on the bankrupt's property." *Sampsell v. Straub*, 194 F.2d 228, 231 (9th Cir. 1951), *cert. denied*, 343 U.S. 927 (1952). Thus, on the date of bankruptcy, Petitioner *at best* held an unexecuted and unperfected tax (judgment) lien, while Respondent trustee obtained the rights of an executing or attaching judment lienor. It seems obvious that Respondent would have priority, and Petitioner's lien could not have been valid under §70(c).

C. State Law Allows the FTB Lien to Be Perfected by Methods Other Than Seizure.

Even assuming *arguendo* that the lien was valid against the trustee under §70(c), the Ninth Circuit correctly held that Petitioner's lien had not met the second test of the proviso, because "[s]tate law does not require seizure to perfect the lien." 487 F.2d at 89 (emphasis added). It based this holding upon the carefully reasoned decision of the First Circuit in *In re J. R. Nieves & Co.*, 446 F.2d 188, 193-194 (1st Cir. 1971).

Citing two scholarly law review articles, the First Circuit reasoned that state law allows almost any lien to be perfected by seizure and that this broad interpretation of the proviso to Bankruptcy Act §67(c)(1)(B) would make the invalidation purpose of that section "meaningless". It therefore follows that the proviso must be construed as allowing substituted, post-bank-

ruptcy perfection only with respect to those liens for which seizure is required in the sense of being the *only* way in which the lienor can perfect its lien.

Petitioner here had several alternative ways in which it could have perfected its lien. As the Ninth Circuit pointed out, 487 F.2d at 85, Petitioner could have issued a warrant for the collection of the tax, an alternative to direct seizure. *See* Cal. Rev. & Tax. Code §18906. Moreover, Petitioner's own citation to Cal. Rev. & Tax. Code §18817, Petition at 34, 40, indicates that Petitioner considers a notice to withhold money or property owed the tax debtor to be an alternative form of levying execution. Since seizure is thus not the *only* method available to Petitioner for perfecting its lien against *bona fide* purchasers, its lien does not meet the second test contained in the §67(c)(1)(B) proviso.

D. Petitioner's Filing of a Proof of Secured Claim Is Not the Filing Notice Required by the Bankruptcy Act.

As indicated above, Petitioner's lien did not meet either of the first two tests under the §67(c)(1)(B) proviso, and its failure to meet any *one* of these tests is enough to defeat its claim. Even if Petitioner's lien could (*arguendo*) meet the first two tests, however, Petitioner would still be required to demonstrate that it filed the appropriate notice with the bankruptcy court.

Petitioner's unsubstantiated assertion that the filing of its proof of claim was sufficient notice is both an incorrect application of the words of the statute and undesirable as a matter of policy. The statute requires filing of "notice thereof," and "thereof" can only be a reference to a notice asserting intention to perfect in accordance with the procedure in the §67(c)(1)(B) proviso. A notice of intention to perfect, which Peti-

tioner has never filed in the instant case, is the only document which would alert the trustee as to the nature of the claim being asserted and therefore as to the appropriate defenses to interpose.

Conclusion.

The primary issues of law in this case have now been carefully considered by three California-based tribunals: the bankruptcy court, the district court, and the Ninth Circuit Court of Appeals. All three tribunals decided in favor of Respondent upon the narrow questions of California law at issue here. The Ninth Circuit's resolution of these issues has no national or even statewide significance beyond the instant case, and, in any event, the Ninth Circuit correctly resolved all issues in accordance with applicable state law and state rules of statutory construction. Thus, by the relevant criteria of Supreme Court Rule 19(b), there is neither a "conflict with applicable state . . . law" nor "an important state . . . question." It is respectfully submitted that no useful purpose would be served by Supreme Court consideration of local issues carefully analyzed below. Even if that were not the case, the fact remains that the Court lacks jurisdiction to grant the Petition since it was filed beyond the period permitted by 28 U.S.C. §2101(c). For all of the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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